BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL WHEELER)	
Claimant)	
VS.)	
)	Docket No. 241,477
BOTTORFF CONSTRUCTION CO.)	
Respondent)	
AND)	
)	
FEDERATED MUTUAL INSURANCE CO.)	
Insurance Carrier)	

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on March 3, 1999.

ORDER

ISSUES

The ALJ ordered respondent to pay temporary total disability compensation and to provide medical treatment through Dr. Tom L. Shriwise. On appeal, respondent contends the evidence fails to establish that claimant met with personal injury by accident and fails to establish that claimant's alleged knee injury arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order should be affirmed.

Claimant worked for respondent, a concrete construction company, as a laborer, operator, and truck driver. The job required that he report each morning to respondent's shop in Atchison where he would be dispatched in a company truck to a job site. Company policy provided that if he was hauling equipment from the shop to the job site he was paid during the trip to and from the job site. If he was not hauling equipment, he did not get paid until he got onto the job site.

On January 6, 1999, claimant hauled what was referred to as an "air screed" from the shop in Atchison to a job site in St. Joseph, Missouri. While at the job site, claimant assisted with concrete work and, because they were pouring concrete, they did not have

time to eat lunch. Around 2:30 to 3:00 in the afternoon, claimant started back to the shop in Atchison, again hauling the air screed. Along the direct route back, claimant stopped at a parking lot of McDonald's where he intended to check the load and get a bite of lunch at the nearby Taco Bell. He used the McDonald's parking lot because it had more room for parking his truck. As he jumped out of the truck, he heard a pop in his knee. He then walked toward Taco Bell and stepped in snow in the median. As he stepped in the snow, his knee twisted or separated and he experienced a sudden onset of severe pain.

Respondent first argues that claimant did not suffer personal injury arising out of and in the course of his employment. Respondent cites definitions of personal injury found in K.S.A. 44-508(c). Activities of daily living are there excluded from the definition of injury. Respondent also cites several appellate court decisions, most particularly *Martin v. U.S.D. No.* 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). In that case, evidence indicated the claimant's preexisting condition resulted in injury as he stepped from a truck.

The Board concludes that the evidence does establish a personal injury by accident. Claimant has a history of prior problems, but the evidence suggests the prior problems were aggravated by the event of jumping down, apparently approximately two feet, from the truck and by the twisting incident in the snow. When the injury is from a combination of the preexisting condition and from a hazard of the employment, the injury should be treated as compensable.

Respondent also argues that the injury did not arise out of employment because claimant was engaged in a personal activity, not part of his employment. Again, the Board concludes the evidence shows the injury arose out of and in the course of employment. The timing and circumstances of claimant eating lunch were for the benefit of the employer. He exited the truck in part to check the load. The evidence also indicates he would have been on the clock at the time the injury occurred. For these reasons, the Board concludes the injury arose out of and in the course of employment.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on March 3, 1999, should be, and is hereby, affirmed.

II IO OO ORDERED.			
Dated this	day of May 1999.		
	BOARD MEMBER		

c: Leah Brown Burkhead, Mission, KSM. Joan Klosterman, Kansas City, MOSteven J. Howard, Administrative Law Judge

IT IS SO ORDERED

Philip S. Harness, Director